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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 572

SIMON L. LEVY, CHARLES B. LEVY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Simon L. Levy and Charles B. Levy, petitioners herein, respectfully pray this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals, entered in the above entitled cause on the 3rd day of November, 1943, affirming an order and judgment of the District Court of the United States for the Southern District of Indiana (R. 428).

A Petition for Rehearing and supporting brief were filed in the United States Circuit Court of Appeals for the Seventh Circuit, which petition was filed on the 12th day of November, 1943, (R. 456) and overruled by said Circuit Court of Appeals without opinion on the second day of December, 1943.

Summary of the Matters Involved.

1. The instant case was a prosecution against the petitioners and others, for the fraudulent use of the mails in the promotion of a merchandising project more fully disclosed in the record.

In the cross-examination of the petitioner, Simon L. Levy, on the trial which took place in December, 1942, the Court permitted, over the objection of petitioners' counsel the following:

> "Q. Mr. Levy, are you the same Simon Levy that was adjudged guilty in the United States District Court at Chicago on November 5, 1927, the charge being using the mails in furtherance of a scheme to defraud, and you were fined some three hundreds on each of twelve counts in the indictment?
>
> Mr. Royse: To which we object, because the evidence is incompetent, and for the further reason that it was nearly twenty years ago and has no bearing on this case whatsoever.
>
> The Court: I do not think it applies to this case, but he may answer.
>
> A. Yes.
>
> Q. State whether or not you are the same Simon Levy who was involved in the United States District Court in the year 1927.
>
> A. I was not convicted.
>
> Q. What do you mean, Mr. Levy?
>
> A. I mean that I was charged and a compromise was offered by the State's attorney who finally accepted a plea of *nolo contendre*, or some such name.

Q. Are you the same man?
A. Yes.
Q. But the court did enter a judgment that you were guilty of the offense charged and fined you three hundred dollars on each count and costs?
Mr. Royse: We object, as not being competent.
The Court: Sustained.
Mr. Pfister: That is all." (R. 280.)

2. In the light of the evidence, which will be more fully explained in the supporting brief, appended hereto, it was reversible error for the trial court to give to the jury the following charge, appearing at page 404 of the Record:

"* * * Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent."

3. In the light of the record, which will be more fully explained in the supporting brief, the Court erred in giving to the jury the following charge, appearing on page 407 of the record:

"A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that the natural and probable consequences of the acts of the defendants in this case, or any or either of them were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, then, as a matter of law, it may be presumed that the defendants intended to do those things."

Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

It is contended that this Court has jurisdiction to review the judgment in question for each of the following reasons:

1. The decision of the Circuit Court of Appeals in upholding the cross-examination of Simon L. Levy as above set out, and in upholding the instructions above set forth, and failing to find prejudical error therein, is in conflict with the decisions of the same and other Circuit Courts of Appeal on the same matter, and in conflict with the decisions of the Supreme Court of the United States.

2. An injustice has been done the petitioners which deprived them of their liberty, in the giving of each of the instructions above mentioned, in the light of the record. It will be presumed that the errors contained in said cross-examination and in said instructions were influential factors in bringing about the verdict of guilty, and this presumption will be supported by arguments appearing in the brief in support hereof.

Reasons for Allowing the Writ.

The Writ of Certiorari should be granted in this case for the following reasons:

1. The cross-examination above referred to, being prejudicial and erroneous, and the failure of the Seventh Circuit Court of Appeals to find error therein, are in conflict with the previous decisions of the same Circuit Court of Appeals, as well as other Circuit Courts of Appeal and the Supreme Court of the United States.

2. The instructions of the trial court to the jury are set forth in full in the record. Among the instructions appear those above referred to, and the opinion of the Circuit

Court of Appeals holds the instructions to be as favorable to the petitioners as they were entitled to. Other Circuit Courts of Appeal, as well as the Supreme Court of the United States, have held otherwise in relation to similar or identical instructions, and the conflict resulting therefrom should be removed.

3. The liberty of citizens of the United States is involved in this case, and where such liberty is in jeopardy, or has been taken away, and a factor thereto has been the giving of prejudicially erroneous instructions by the trial court to the jury, it is within the purview of this court to intervene on a Writ of Certiorari to correct the injustice that has been done.

WHEREFORE your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8225, *Simon L. Levy and Charles B. Levy, appellants* v. *The United States of America, appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

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Attorneys for Petitioners.

JOSEPH H. LESH,
Of Counsel.

BRIEF.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (138 Fed. (2nd) 429) appears in full in the record (R. 448). No opinion was rendered by the District Court.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

STATEMENT OF THE CASE.

This prosecution was brought in the District Court of the United States for the Southern District of Indiana, and the petitioners herein, with eight other individuals and two corporations, were charged with a fraudulent scheme and the use of the United States mails in its execution.

The indictment contained six counts, in five of which, in identical terms, the scheme was described, and in Count 6 was charged a conspiracy to commit the fraud alleged in the other five counts.

The jury returned a verdict of guilty against all defendants on all of the counts, but prior to the jury's retirement, each defendant had filed a motion for an instructed verdict. After the verdict had been returned, the Court sustained the motion as to six of the individuals, gave a nominal suspended sentence of one day to two of the other individuals, and a sentence of five years to the two petitioners herein.

That the case was one of grave doubt as to its merits, even in the mind of the Circuit Court of Appeals, is shown by the following quotation from the opinion of that Court:

> "We agree with the contention that much of the proof, even that offered by the Government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as 'puffing', or extolling the merits of their business and product." (R. 450.)

Under such circumstances, in the administration of justice, courts should, and do, consider with care the question of whether or not prejudicial errors entered into the trial of the case which may have influenced the jury in arriving

at its verdict, and where errors of this type are disclosed, it will be presumed that they did, in fact, have weight with the jury.

From an examination of the record it will appear that the Government sought to introduce evidence of a former indictment of Simon L. Levy, one of the petitioners herein, and a sentence thereon upon a plea of *nolo contendre*, and in the Court's charge to the jury it dealt with the force and effect of such evidence. It is true that the points with respect thereto were not saved by the trial attorneys of the petitioners, with the technical niceties that are laid down in the rules of practice, but they are specifically pointed out in the petition for rehearing before the Circuit Court of Appeals, the errors were plain, and it appears to us that the prejudice therein is so glaring as to require this Court to grant a writ of certiorari and reverse the judgment of conviction and order a new trial by reason thereof.

By the cross-examination of petitioner Simon L. Levy, over the objection of petitioners' counsel, as set forth in paragraph 1 of Summary of the Matters Involved in the above petition for the writ of certiorari herein, the jury was made aware of the fact that Simon Levy was adjudged guilty in November, 1927 in the United States District Court at Chicago on a charge of using the mails in furtherance of a scheme to defraud and was fined upon each of 12 counts in the indictment. The above quotation discloses that first the trial court permitted the fact of such judgment of conviction to be shown with a statement that he thought it did not apply to the case and then he expressly sustained an objection to the evidence of such judgment.

It is obvious that if the jury believed that Simon Levy had a criminal record, even though the conviction referred

to took place more than fifteen years before the trial and even though there was no evidence to show that Simon Levy since that date had not led an upright and respectable life, the jury, unless properly instructed, would be apt to find the *defendants-petitioners* guilty. This they might not have done had the fact of such judgment of conviction not been brought to their attention. In this connection it is most interesting to note that the jury not alone found the petitioners Simon L. Levy and Charles B. Levy guilty, but they found all of the defendants guilty. Yet, notwithstanding such verdict, as the opinion of the Circuit Court of Appeals shows, six of the individual defendants found guilty by the jury were acquitted on a motion for a directed verdict, the ruling on which had been reserved by the trial court.

While the evidence of such alleged former conviction of Simon Levy was not in any way connected up with the petitioner Charles B. Levy or any of the other defendants, nevertheless, since the defendants were all charged with being parties to the scheme or artifice to defraud and to a conspiracy to violate the mail fraud statute, if the evidence of such alleged former conviction was reversibly erroneous as to Simon Levy, it was equally so as to Charles B. Levy, petitioner herein.

The harmful character of the evidence of such alleged former conviction was increased by the manner in which the trial judge dealt with it in his charge to the jury.

We respectfully request the Court to consider that part of the trial court's charge to the jury appearing at page 404 of the transcript, reading as follows:

> "* * * Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evi-

> dence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent."

We submit that the prejudice against all of the defendants created by the cross-examination of the petitioner Simon Levy with respect to his alleged former conviction on a plea of *nolo contendre* on November 5, 1927, was substantially increased by the erroneous charge to the jury above quoted. The trial court erroneously told the jury that such alleged former conviction could be considered by it for the purpose of determining the weight and credit to be given to the testimony of Simon Levy and as to his intent (Tr. 404, 417).

It seems to us that the error in the court's charge with reference to the alleged conviction is rendered more glaring by the fact, as shown on page 280 of the transcript, that the trial court sustained an objection to the question by the prosecuting attorney as to whether the United States District Court in 1927 entered a judgment against Simon Levy that he was guilty of the offense charged and fined three hundred dollars on each count.

The comment of the trial court in its charge to the jury above referred to, we respectfully submit, would have been unwarranted even if the court had not sustained the objection to the question of the prosecutor as above set forth. It is clear under the authorities that the plea of *nolo contendre* does not create an estoppel against the defendant, but merely constitutes an admission of guilt for the purposes of the particular case in which it is made. If this be so, then the finding of guilty on a plea of *nolo contendre* to a charge of a violation of the mail fraud statute cannot possibly be evidence on a later charge of a violation of the same statute where no connection whatever is shown between the alleged scheme to defraud involved in the judgment of conviction and that involved

in the case in which such judgment of conviction is offered for the purpose of showing the defendant's intent.

In the case of *Tucker* v. *United States,* 196 Fed. 260, (C. C. A. 7th) in discussing a plea of *nolo contendre,* said:

> "The plea is thus well characterized, under the definitions of Hawkins and Chitty, in *State* v. *La Rose,* 71 N. H. 435, 438, 52 Atl. 943, viz: 'The plea is in the nature of a compromise between the state and the defendant,—a matter not of right but of favor. Various reasons may exist why a defendant conscious of innocence may be willing to forego his right to make defense if he can be permitted to do so without acknowledging his guilt. Whether in a particular case he should be permitted to do so is for the court."

In *State* v. *La Rose, supra,* quoted from with approval by that Court in the *Tucker case,* the Court squarely held that a conviction on a plea of *nolo contendre* was not admissible in evidence in a later criminal case for any purpose.

In *Hudson* v. *United States,* 272 U. S. 451, at p. 455, the Supreme Court, in discussing such a plea, said:

> "Like the implied confession this plea does not create an estoppel, but like the plea of guilty, it is an admission of guilt *for the purposes of the case."* (Emphasis supplied.)

If the acceptance of a plea of *nolo contendre* and the imposition of a fine does not create an estoppel against the defendant, but merely constitutes an admission of guilt for the purposes of the particular case in which it is made, then it would seem clear that the so-called conviction based upon such plea may not be used for the purpose of affecting the credibility of the defendant or proving his intent, upon a criminal trial against him 15 years later, or at any other time. To the effect that it may not be so used, see Vol. 9 Cyclopedia of Federal Procedure (2nd Ed.) Sec. 4141, note 77.

In any event the lapse of time since the entry of the order in 1927, even if such order were treated the same as a general conviction on a plea of guilty or one of not guilty, would render it too remote as a matter of law to affect the credibility of Simon Levy or to establish his intent on the trial of the case now under review (70 Corpus Juris, Sec. 1057). This is especially true since there is no evidence whatever in the record, that Simon Levy since 1927 up to the date of the trial of the case under review had any other convictions against him or had not lived an upright and respectable life.

The greatest evil in the charge of the court as to the effect of the alleged conviction in 1927 of Simon Levy was his comment that the jury should consider it *as to his intent* on the present trial. Bearing in mind that the trial court had previously charged the jury that the business of the defendant upon its face was in fact legitimate (Tr. 415) and according to the charge to the jury the whole issue was as to the *intent* with which the business was conducted, it would seem grievous error for the trial court to instruct the jury that in arriving at the *intent* with which the defendant Simon Levy conducted the business which upon its face was legitimate, the jury *should consider an alleged conviction* on a wholly unrelated mail fraud charge that took place 15 years prior to the trial of the present case.

If that kind of evidence is held to be admissible, not merely for the purpose of affecting the credibility of the defendant, but also to establish his *intent*, then there is no hope whatever for a person who has once been convicted of violating a mail fraud statute that he can ever redeem himself in society. (See special concurring opinion of Mr. Justice Shaw joined in by Justices DeYoung and Farthing in *People* v. *Serriell*, 354 Ill. 182, at 189, and *People* v. *Willy*, 301 Ill. 307, at 391; 70 Corpus Juris 854, Sec. 1057.)

The trial court after the charge was over struck out the word conviction and substituted therefor the statement that Simon Levy was involved in a controversy in the Federal Court. Such change did not in any way remove or even reduce the prejudicial errors set forth above, resulting from the charge that evidence of that earlier court proceeding involving petitioner, Simon Levy, should be considered by the jury for the purpose of determining the weight and credit to be given to the testimony of Simon Levy and *as to his intent.*

To summarize the prejudicial errors resulting from this portion of the charge: (1) it was unsupported by the evidence since the trial court had sustained an objection thereto, (2) punishment imposed by the court upon a defendant pleading *nolo contendre* may not be shown in evidence in a later criminal case for any purpose, (3) even if an order imposing punishment based upon a plea of *nolo contendre* were admissible under proper circumstances to affect the credibility of the defendant testifying as a witness in a trial of a subsequent criminal indictment and to prove the specific intent which must be established as a part of the crime for which he is subsequently charged, the fact that this earlier court proceeding occurred 15 years previously, coupled with the absence of any showing that the defendant did not lead an entirely lawful and upright life in the interim, made the use thereof in this case prejudicially erroneous, and (4) even if an order imposing punishment based upon a plea of *nolo contendre* were admissible under proper circumstances to prove specific intent which must be established as a part of the crime for which he is subsequently charged, the charge in this case in that respect was, nevertheless, prejudicially erroneous since the record fails to disclose any relationship of any kind whatever between the charges against the petitioner, Simon Levy, in the indictment to which he pleaded *nolo contendre* in 1927 and in the indictment here-

in, other than the bare fact that both constituted charges of violations of the mail fraud act.

If we are correct in our contention that the court herein committed prejudicial error, in its charge as to the effect to be given to the sentence of Simon Levy on his plea of *nolo contendre* in 1927, then the convictions of both appellants are reversibly erroneous, since it is impossible to determine that the prejudice therefrom to Charles Levy was any different or less, so far as the jury was concerned, than the prejudice to Simon Levy. Moreover, Charles Levy, as a defendant, was entitled to the full benefit of the testimony of the witness, Simon Levy, unaffected by any erroneous charge respecting his credibility.

The Circuit Court, we respectfully submit, overlooked in its consideration of the appeal that there is another respect in which the trial court committed reversible error in its charge to the jury. The court in its charge to the jury said (Tr. 414-15):

> "The business in which the defendants were engaged may have been perfectly legitimate, and there is no charge in the indictment but that such business was legitimate. In fact, the Government does not contend that such business, upon its face, was not legitimate. The fact is that such business, upon its face, was legitimate. It is the contention of the Government, however, that it was the intention of the defendants to convert the money paid to them by the appointed distributors for such distributorship to their own use, without any intention upon their part, to carry out the contract entered into by and between them, and thus defraud such distributors out of the deposit thus made. This, in brief, constitutes the scheme charged in the indictment.
>
> "A business perfectly legitimate, and fair and honest, upon its face, may, nevertheless be used as a scheme to defraud, if it is the intention and the purpose of the person or persons so engaged to use such business as a scheme to defraud. It may be necessary, in order to deceive that the scheme, upon its face,

should appear to be fair and honest. Under the law, it makes no difference how seemingly fair and honest a scheme may be if the purpose of the scheme is to defraud, it is within the statute."

Previously the court had charged the jury as follows (Tr. 407):

"A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that *the natural and probable consequences* of the acts of the defendants in this case, or any or either of them, were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, *then, as a matter of law,* it may be presumed that the defendants intended to do those things." (Italics supplied.)

As the above quoted charge taken from page 414-415 of the transcript discloses, the trial court believed and so charged the jury that the business in which the defendants were engaged was perfectly legitimate. Nevertheless the jury were told that such a legitimate business might be used as a scheme to defraud if it was the intention and purpose of the person or persons engaged in that business to use it as a scheme to defraud. Under the authorities a successful prosecution under the mail fraud statute requires proof of a specific intent. *Hibbard* v. *U. S.,* 172 Fed. 66.

The trial court gave to the jury in the cited case the same instruction which is quoted above from page 407 of the transcript. The 7th Circuit in the Hibbard case reversed the judgment of conviction on a charge of violating the mail fraud statute for the giving of such instruction. After the opinion was filed, the Government applied for a rehearing and in the opinion on such rehearing, in discussing the instruction, that Court said at page 73:

"Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error con-

sists in applying it to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as anyo ther element of criminality is proven. The instruction as given (bearing in mind the case to which it was applied) though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error."

In the light of the holding in *Hibbard* v. *U. S.*, (the decision in which was rendered by the same Circuit Court of Appeals as rendered the decision here sought to be reviewed) the charge above set forth from page 407 of the transcript was reversibly erroneous.

We respectfully submit that the record on this review clearly discloses that the petitioners, Simon L. Levy and Charles B. Levy, did not have a fair and impartial trial and that serious and prejudicial error was committed in the respects referred to above.

As has been repeatedly held by the Federal Circuit Courts of Appeals, where life or liberty is involved the court may notice and correct a serious error plainly prejudicial, even though it was not called to the attention of the trial court or even where the error was not preserved for review by proper objection, exception or assignment. *Miller* v. *United States,* 120 Fed. (2) 968. In the Miller Case, the court said at page 972:

"Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court. *Troutman* v. *United States,* 10 Cir. 100 F. 2d 628, 634, or even where the error was not preserved for review by proper objection, exception or assignment, *Strader* v. *United States,* 10 Cir., 72 F.

2d 589, 593; *Williams* v. *United States*, 10 Cir. 66 F. 2d 868; *Bogileno* v. *United States*, 10 Cir. 38 F. 2d 584; *Kelly* v. *United States*, 10 Cir. 76 F. 2d 847."

See all to the same effect:

Reynolds v. *United States*, 48 Fed. (2d) 762.
Hayes v. *United States*, 112 Fed. (2d) 676.
Meadows v. *United States*, 82 Fed. (2d) 881.
Benson v. *United States*, 112 Fed. (2d) 422. Certiorari denied, 61 Sup. Ct. 43, 311 U. S. 644.
Hannon v. *United States*, 99 Fed. (2d) 933.
Thomas v. *District of Columbia*, 90 Fed. (2d) 424.

Plain errors first called to the attention of the Circuit Court of Appeals in a petition for rehearing should be considered and passed upon by that Court.

Pierce v. *United States*, 255 U. S. 398.

See also *Sheridan* v. *U. S.*, 312 U. S. 654; *Hemphill* v. *U. S.*, 312 U. S. 658; and *Wiborg* v. *U. S.*, 163 U. S. 632, at 659.

We respectfully submit that the glaringly prejudicial harm suffered by these petitioners by reason of the conduct of their trial pointed out hereinabove will satisfy this Court as to the injustice done and the necessity for a new trial.

WHEREFORE we respectfully pray this Honorable Court to grant the petition for a Writ of Certiorari, and for all other further and proper relief.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

SIMON L. LOEB, PETITIONER,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE [illegible]

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 448–455) is reported at 138 F. (2d) 429.

JURISDICTION

The judgment of the circuit court of appeals was entered November 3, 1943 (R. 456), and a petition for rehearing (R. 457–471) was denied December 2, 1943 (R. 473). The petition for a writ of certiorari was filed January 3, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI

and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in a trial on a charge of using the mails to defraud, the court committed reversible error in permitting the prosecution to bring out on cross-examination of petitioner Simon L. Levy that in 1927 he pleaded nolo contendere to a mail fraud charge and was fined, and in permitting the jury to consider such evidence on the questions of this petitioner's credibility and intent.

STATEMENT

On September 26, 1942, petitioners and others were indicted, in the District Court of the United States for the Southern District of Indiana, in six counts (R. 2–17), five of which charged them with having used the mails in execution of a scheme to defraud in connection with the distribution of prefabricated houses,[1] in violation of Section 215 of the Criminal Code (18 U. S. C. 338) (R. 2–13); the sixth count charged them with conspiring to do the acts alleged in the other counts, in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 13–17). Petitioners were tried before a jury, which found them guilty on all six counts

[1] The details of the scheme as charged and the evidence relied upon to establish it and the accompanying misrepresentations are summarized in the opinion of the circuit court of appeals (R. 448–450, 450–453).

(R. 425). They were each sentenced generally to imprisonment for five years and to pay a fine of $500 (R. 428). Upon appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the convictions (R. 456) and thereafter denied a petition for rehearing (R. 473).

At the trial, petitioner Simon L. Levy took the stand as a witness for the defendants (R. 257) and on cross-examination by government counsel testified that on November 5, 1927, he pleaded nolo contendere in the District Court for the Northern District of Illinois to a charge of using the mails in execution of a scheme to defraud and that he was adjudged guilty and fined on each of twelve counts of the indictment (R. 280).[2] In respect of this testimony the court charged the jury:

> * * * Evidence was introduced on behalf of the Government that the defendant,

[2] The testimony in this respect was as follows (R. 280):

"Q. Mr. Levy, are you the same Simon Levy that was adjudged guilty in the United States District Court at Chicago on November 5, 1927, the charge being using the mails in furtherance of a scheme to defraud, and you were fined some three hundreds [sic] on each of twelve counts in the indictment?

"Mr. Royse. To which we object because the evidence is incompetent, and for the further reason that it was nearly twenty years ago and has no bearing on this case whatsoever.

"The Court. I do not think it applies to this case, but he may answer.

"A. Yes.

"Q. State whether or not you are the same Simon Levy

> Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given to his testimony, and as to his intent. [R. 404; see, also, the further instruction at R. 416–417, discussed at pp. 9–10, *infra*.]

---

who was involved in the United States District Court in the year 1927.

"A. I was not convicted.

"Q. What do you mean, Mr. Levy?

"A. I mean that I was charged and a compromise was offered by the State's attorney who finally accepted a plea of *nolo contendere*, or some such name.

"Q. Are you the same man?

"A. Yes.

"Q. But the court did enter a judgment that you were guilty of the offense charged and fined you three hundred dollars on each count and costs?

"Mr. ROYSE. We object, as not being competent.

"The COURT. Sustained.

"Mr. PFISTER. That is all."

While the reasoning underlying the judge's rulings on this line of cross-examination is not clear, it is plain from his instruction to the jury in this respect (see quotation from the charge in the succeeding sentence of the text) that he sustained petitioners' objection to only the last question and not to the entire line of cross-examination. Similarly, we submit that petitioner Simon Levy's assertion that he was not convicted, after he testified that he was fined on each count of the indictment shows that he was using "conviction" in the sense of a judgment rendered after a trial and a finding of guilty. Petitioners do not deny that a judgment of conviction was entered on Levy's plea of nolo contendere.

ARGUMENT

Petitioners contend (Pet. 10–14) that since the entry of a plea of nolo contendere does not create an estoppel against a defendant and merely constitutes an admission of guilt for purposes of the case, a conviction based thereon may not subsequently be used for the purpose of impeaching his credibility or proving his intent.

1. It was proper, we submit, for the Government on cross-examination to show petitioner Simon Levy's prior conviction for mail fraud and for the court to permit the jury to consider that fact on the issues of his credibility and intent.[3] When this petitioner took the stand, his credibility, like that of any other witness, was subject to impeachment. *Raffel* v. *United States,* 271

[3] We have assumed that the questions presented are open to petitioner Charles Levy as well as petitioner Simon Levy, since the latter was called as a witness for all the defendants (R. 257). There is considerable doubt as to whether, even if there were merit in petitioners' contentions, the errors were sufficiently prejudicial to justify reversal. The circuit court of appeals in its opinion said (p. 450):

"We agree with the contention that much of the proof, even that offered by the government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as 'puffing' or extolling the merits of their business and product. On the other hand, there are disclosed numerous misrepresentations of fact which we find difficult, if not impossible, to reconcile with defendants' honesty and good faith."

U. S. 494, 497; *United States* v. *Buckner,* 108 F. (2d) 921, 927 (C. C. A. 2), certiorari denied, 309 U. S. 669; *United States* v. *Gross,* 103 F. (2d) 11, 13 (C. C. A. 7); see also *Johnson* v. *United States,* 318 U. S. 189, 195. Consequently, evidence of a prior conviction was, of course, admissible on the issue of his credibility. *Rinella* v. *United States,* 60 F. (2d) 216, 218 (C. C. A. 7); *Jebbia* v. *United States,* 37 F. (2d) 343, 344 (C. C. A. 4), certiorari denied, 281 U. S. 747; *Nutter* v. *United States,* 289 Fed. 484, 485 (C. C. A. 4); *MacKnight* v. *United States,* 263 Fed. 832, 840 (C. C. A. 1). And, since Levy's intent was an essential ingredient of the offense charged, this evidence of a prior conviction for mail fraud, the crime charged in the instant case, was likewise admissible on the question of his intent. *Edwards* v. *United States,* 18 F. (2d) 402, 403 (C. C. A. 8); *Tedesco* v. *United States,* 118 F. (2d) 737, 740 (C. C. A. 9); see *Lynch* v. *United States,* 12 F. (2d) 193, 194 (C. C. A. 4); *Heglin* v. *United States,* 27 F. (2d) 310, 312 (C. C. A. 8); *Edwards* v. *United States,* 249 Fed. 686, 690 (C. C. A. 6), certiorari denied, 248 U. S. 560.

While it is true that a plea of nolo contendere does not estop the defendant from proving his innocence in a civil action, otherwise it is the same as a plea of guilty in a criminal proceeding in that it removes all issues of fact from the case and supports a judgment of conviction. *Hudson*

v. *United States,* 272 U. S. 451, 455; *United States* v. *Norris,* 281 U. S. 619, 622; *Farrington* v. *King,* 128 F. (2d) 785, 786 (C. C. A. 8); *United States* v. *Food and Grocery Bureau of Southern California,* 43 F. Supp. 974, 979 (S. D. Cal.); *State* v. *Suick,* 195 Wis. 175 (1928). And, we submit, that judgment may properly be shown on cross-examination of the defendant in a later criminal prosecution for the purpose of impeaching his credibility (*Fisher* v. *United States,* 8 F. (2d) 978 (C. C. A. 1), certiorari denied, 271 U. S. 666; *State* v. *Hill,* 145 Kan. 19 (1937); *State* v. *Herlihy,* 102 Me. 310 (1906); *State* v. *Henson,* 66 N. J. Law 601, 609 (1901); *State* v. *Radoff,* 140 Wash. 202, 205 (1926)), and for the purpose of showing his intent.[4]

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[4] Compare *United States ex rel. Bruno* v. *Reimer,* 98 F. (2d) 92 (C. C. A. 2), where it was held that a conviction based on a plea in the nature of nolo contendere together with a subsequent conviction were sufficient to support an order of the Secretary of Labor that the petitioner be deported as an alien "who was twice sentenced to imprisonment * * * because of conviction in this country of a crime involving moral turpitude," the court saying: "Since it [deportation] depends on conviction and sentence, conviction and sentence are the only relevant facts, and the accused may be deported whenever these have been procured by any lawful procedure" (p. 93). Similarly, in the instant case, petitioner's prior conviction, which is undisputed, could be shown, regardless of whether he pleaded guilty, not guilty, or nolo contendere to the indictment. It is the fact of conviction, rather than the defendant's plea, which furnishes the basis for its admission. Compare,

Whether the prior conviction was so remote as to have no materiality (see Pet. 12–13) was properly a question for the trial judge in the exercise of a sound discretion. *Teese* v. *Huntington*, 23 How. 2, 14; *Fire Ass'n of Philadelphia* v. *Weathered*, 62 F. (2d) 78, 79 (C. C. A. 5); *United States* v. *Shurtleff*, 43 F. (2d) 944, 948 (C. C. A. 2).[5] The prior conviction, it is true, occurred approximately 15 years previously, but in view of the similarity of the prior charge to the one on trial, we submit that there was no abuse of discretion in admitting the evidence. And having admitted it, the judge properly, and indeed to the advantage of the defendants, left to the jury the determination of the weight to be accorded to it solely on the issues of petitioner Simon Levy's credibility and intent. *Murray* v. *United States*,

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also, *State* v. *LaRose*, 71 N. H. 435 (1902), relied upon by petitioners (Pet. 11), in which evidence of a plea of nolo contendere, without a showing that a judgment of conviction was entered thereon, was held inadmissible in a later criminal proceeding. To the same effect, see *State* v. *Conway*, 20 R. I. 270 (1897).

[5] See, also, *Packer* v. *United States*, 106 Fed. 906, 909 (C. C. A. 2) (one-year time interval, but matter of time said to "rest practically in the discretion of the trial judge"); *Wolfson* v. *United States*, 101 Fed. 430, 433 (C. C. A. 5), certiorari denied, 180 U. S. 637 (over three years); *Walsh* v. *United States*, 174 Fed. 615 (C. C. A. 7), certiorari denied, 215 U. S. 609 (12 years); *Kettenbach* v. *United States*, 202 Fed. 377, 384 (C. C. A. 9) (reports going back seven years were admitted).

288 Fed. 1008, 1014 (App. D. C.), certiorari denied, 262 U. S. 757; cf. *Mudsill Mining Co.* v. *Watrous*, 61 Fed. 163, 179–180 (C. C. A. 6). In any event, however, the evidence was not "of sufficient weight to make reversible error." *United States* v. *Shurtleff, supra.*[6]

2. The court's instruction to the jury (*supra*, pp. 3–4), of which petitioners complain (Pet. 10–14), plainly shows that the testimony concerning petitioner Simon Levy's prior mail fraud conviction was, as we have shown, properly limited to the issues of his intent and credibility. But, assuming *arguendo* that consideration of the conviction for even these limited purposes was erroneous, petitioners failed properly to preserve the point in the trial court. After the judge had instructed the jury, he accorded petitioners a full opportunity to except to the charge; and the court, in an obvious effort to avoid any possibility of error, amended the instructions in accordance with petitioners' requests (R. 416–417). More specifically, petitioners challenged the instruction relating to the prior conviction on the sole ground that the court should not have used the word "conviction" in the instruction. In compliance with petitioners' desires, the court struck "conviction" from the instruction and changed it to state that petitioner Simon Levy "was involved in a con-

[6] See footnote 3, *supra*, p. 5.

troversy in the Federal Court" (R. 416–417).[7] Petitioners specifically advised the court that with this modification the instruction was satisfactory and that they took no exception to it (R. 417). Accordingly, they did not assign it as error on appeal (R. 433–434); it was in the petition for rehearing in the court below that the question was raised for the first time (R. 460–467).

In these circumstances it is plain that petitioners waived their objection to the cross-examination of Simon Levy concerning his prior conviction by "acquiescing in the treatment of the matter by the court." *Johnson* v. *United States*, 318 U. S. 189, 200. It is true, as petitioners state (Pet. 16–17), that this Court may of its own motion notice serious error;[8] but, "we are not here dealing with inadvertence or oversight," and it is plain that counsel " 'consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied' " (318 U. S. at

[7] Petitioners do not suggest that the instruction was erroneous because it permitted the jury to consider mere involvement in a controversy in the federal courts on the issues of intent and credibility. And in the circumstances of this case we do not believe that such a contention might be urged successfully, for it was at petitioners' request that the correct instruction was amended to their advantage by omitting reference to the fact of conviction, which petitioners claim (Pet. 8–9) operates to prejudice a jury.

[8] Cf., however, the quotation from the opinion of the circuit court of appeals in footnote 3, *supra*, p. 5, as to strength of the Government's case.

200).[9] Now to recognize petitioners' belated challenge is to "permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him" (318 U. S. at 201). The fact that petitioners specifically agreed to the instruction, as modified at their request, and did not assign it as error, "makes clear that the point now is a 'mere afterthought' " (318 U. S., at 201).[10]

[9] Different counsel are now representing petitioners (R. 25).

[10] Petitioners have singled out from the court's charge to the jury on the question of intent its reference to the rule that persons are presumed to intend the natural and probable consequences of their acts, and on the authority of *Hibbard* v. *United States*, 172 Fed. 66 (C. C. A. 7), they contend that this was prejudicial error in that it rendered unnecessary proof of specific intent (Pet. 14–15). Petitioners did not except to the charge in this respect (R. 416–418) or assign it as error in the court below (R. 433–434). Moreover, the language complained of, when restored to its context, was directly modified by a full discussion of the intent question, in which the court made abundantly clear the Government's burden of proving intent beyond a reasonable doubt (R. 405–409). Compare *Walsh* v. *United States*, 174 Fed. 615, 619 (C. C. A. 7), certiorari denied, 215 U. S. 609, in which the same court which decided the *Hibbard* case distinguished it on the ground that other parts of the charge, as in the instant case, made it clear that the burden of proving intent beyond a reasonable doubt remained with the Government. Compare, also, *Agnew* v. *United States*, 165 U. S. 36, 50–51; *Grayson* v. *United States*, 107 F. (2d) 367, 369–370 (C. C. A. 8). Irrespective of these considerations, however, petitioners suffered no prejudice. For when the presumption instruction is considered in the light of the subsequent instruc-

CONCLUSION

Petitioners do not challenge the sufficiency of the evidence to support their convictions and their contentions here present no question calling for further review on certiorari. It is, therefore, respectfully submitted that the petition should be denied.

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JANUARY 1944.

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tion (R. 414–415) that petitioners' business was on its face a legitimate one, it is plain that the jury was effectively precluded from reasoning that an intent to carry out a fraudulent scheme could be predicated alone upon the inherent nature of petitioners' activities. In short, the instruction that petitioners' business was ostensibly legitimate prevented the operation of the presumption herein attacked by petitioners, and the jury was required to find the fraudulent intent from the direct and circumstantial evidence before it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 572

SIMON L. LEVY, CHARLES B. LEVY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON THE PETITION FOR WRIT OF CERTIORARI.

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SIMON L. LEVY, CHARLES B. LEVY,
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PETITION FOR REHEARING ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION.

Counsel believe that the denial of the petition for certiorari was predicated primarily upon the assertion in the brief of Government (pp. 10, 11) that the errors complained of related to points that petitioners' trial counsel "consciously and intentionally" failed to save, and that such counsel led the trial judge to "understand that counsel was satisfied." We further believe that, as we shall show, the record fails to disclose any such express waiver, but on the contrary the waiver, if any, was inadvertent.

In support of this petition for a rehearing we herewith submit a brief appended hereto and by reference made a part of this petition for rehearing.

BRIEF.

This prosecution was brought in the District Court of the United States for the Southern District of Indiana and the petitioners herein with eight other individuals and two corporations were charged with a fraudulent scheme and the use of the United States mails in its execution.

In the original petition for writ of certiorari, and brief in support thereof filed in this case and to which reference is herein made, the petitioners pointed out certain errors committed on the trial of the case in the District Court, which errors were highly prejudicial to the rights of these petitioners.

These errors related to the attempted introduction of certain testimony regarding a prior case in which the petitioner, Simon L. Levy, was faced with a similar charge to the one described in the indictment herein over fifteen years prior to the date of the present indictment, and in which a plea of *nolo contendere* had been entered, and also in the giving by the court of certain instructions relating thereto. These errors also related to the action of the court in the giving of certain instructions to the effect that a person is presumed to intend the natural and probable consequences of his own voluntary act, and that if the natural and probable consequences of the acts of the defendants in this case or any or either of them were to do the things condemned by statute and that such acts were done voluntarily by the defendants *then as a matter of law* it may be presumed that the defendants intended to do those things.

The evidence and the exact language of the offending instructions complained of is fully set out in the petition for the writ of certiorari and brief in support thereof filed in this case and need not be here repeated.

For the purpose of establishing an effective waiver of the errors referred to above, the case cited and relied upon by the respondent is the case of *Johnson* v. *United States*, reported in 318 United States, 189. The Johnson case is clearly distinguishable from the case at bar in this: That in the Johnson case there was an express waiver of the objection to the matters complained of, whereas in the case at bar there was no such waiver of the objections, either to the offending testimony (to which petitioners' objection was sustained) referred to in our Petition for Writ of Certiorari or to the instructions therein complained of. As a matter of fact, the Johnson case contains a true expression of the recognized principles herein involved, for the application of which to this case the petitioners contend.

We quote from the decision in the Johnson case as follows:

> "It is true that we may of our own motion notice errors to which no exception has been taken, if they would seriously affect the fairness, integrity, or public reputation of judicial proceedings (citing cases) but we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. In such a situation the rule stated by Mr. Sutherland in *United States* v. *Manton*, 107 F. (2d) 834, 848, is applicable:
>
> 'If the failure to enter an exception or assign error had been a mere inadvertence, the matter might stand in a different light, but that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point, and led the trial judge to understand that counsel was satisfied.' "

With respect to the attempted introduction in evidence of the prior prosecution against the petitioner Simon Levy, over fifteen years before the date of the present indict-

ment, and the entry of judgment on a plea of *nolo contendere* in that case, as set out fully on pages 2 and 3 of the Petition for Writ of Certiorari, it cannot be successfully contended that there was an express waiver of this error by the petitioner. There was in fact a vigorous objection to this testimony and although the court said, "I do not think it applies to this case" (see Record, page 280), the court nevertheless permitted the evidence to be introduced and then expressly *sustained* an objection of petitioners thereto (R. 280).

A reading of the transcript, we believe, will indicate that confusion existed in the mind of trial counsel as to the real state of the record concerning the admission in evidence of the remote former conviction on a plea of *nolo contendere*. This confusion no doubt was increased when the trial judge expressly repeated to trial counsel for petitioners that part of his charge relating to the effect the jury should give to such former conviction. The court said:

> "Here is the instruction as I gave it: (Reading) 'Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given his testimony and as to his intent.'" (R. 417.)

Trial counsel's confusion as to the state of the record is shown by the colloquy which occurred between the court and such counsel after the court repeated the above portion of his charge to the jury (R. 417):

> "Mr. Royse: The only word I was questioning was the 'conviction.'
>
> The Court: Well, there might still be a conviction on a plea of *nolo contendere* and the court enter a finding of guilty, which would constitute a conviction.

Mr. Royse: There isn't an entry finding him guilty.

The Court: What word would you suggest that I use?

Mr. Royse: Your Honor, I may be dead wrong, but it just seems to me—

The Court: Well, if you have a different word that you want me to use, I will use it.

Mr. Royse: The use of the word 'conviction' infers that he was involved in some litigation or some dispute with the United States Government and raises a presumption which I don't think is supported by the evidence.

The Court: Just strike out the word 'conviction' and say that he was involved in a controversy in the Federal Court.

Mr. Royse: Thank you.

The Court: Is that satisfactory?

Mr. Royse: Yes, that is satisfactory, your Honor.

The Court: The record shows no exception to the instruction.

Mr. Royse: That is right, your Honor."

It thus appears that although the trial court had actually sustained the objection of petitioner's trial counsel to evidence of such former conviction his charge assumed that he had really admitted such prejudicially erroneous evidence and this fact might easily have added to the mental confusion of such counsel as to the actual state of the record. We respectfully submit that no express waiver of the errors complained of can be spelled out of the circumstances shown by the record on page 417 of the record. At most the waiver was inadvertent under the authority of the case of *Johnson* v. *United States*, 318 U. S. 189, cited and relied upon by the respondent. The failure of petitioners' counsel to continue his objections was excusable, and created the very condition under which the Court in that case declared that it was proper for this Court to take notice of such error. It seems to us that the situation was one calling for the protection of the rights of the defendants by the trial judge.

In this connection, we call attention to the case of *Glasser* v. *United States*, reported in 315 U. S. 60. In the Glasser case, the defendant, Glasser, was represented by counsel appointed by the court, being the same counsel appearing for a codefendant, Kretske. It appeared that there would be conflicting interests between the defendants Glasser and Kretske in the introduction of evidence, and this conflict was known to court and counsel for Glasser and Kretske. Glasser remained silent upon the appointment, and no objections or exceptions were made or preserved by either Glasser or the counsel appointed for him. This Court held in passing upon the case that there was error in the appointment of counsel for Glasser in this: That such counsel was not free to fully protect the interests of Glasser, by reason of his conflicting interest in Kretske, and although no objections were preserved anywhere in the record, it was the duty of this Court to correct the error and reverse the judgment, which was accordingly done.

What has been said about with respect to the errors in rulings of the court as to the admission of evidence regarding the former proceedings in the Chicago court some fifteen years earlier, and the court's instructions in relation thereto, apply with equal force to the instruction given by the court in the case as follows:

> "A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that the natural and probable consequences of the acts of the defendants in this case, or any or either of them, were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, then, as a matter of law, it may be presumed that the defendants intended to do those things." (R. 414-415.)

As pointed out in our original petition for certiorari, this is the same instruction for which the judgment was reversed in the case of *Hibbard* v. *United States*, 172 Fed. 66. In the opinion of the court denying a petition for rehearing in that case, the court said:

> "Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error consists in applying it to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven. The instruction as given (bearing in mind the case to which it was applied) though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error." (See Page 73.)

Little or no effort has been made by the respondent to justify the giving of this instruction, but respondent relies upon the failure to save the question with the technical nicety that is always desirable, but, we earnestly maintain, not indispensable, to protect the life or liberty of a citizen whose rights have been impaired through errors committed by the trial court.

From the opinion of the Court in the case of *Glasser* v. *United States* above cited, we quote as follows:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. The error, which under some circumstances, would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." (Page 67.)

As evidence of the fact that this is just such a case, where the scales of justice were so delicately poised, we quote from the opinion of the Circuit Court of Appeals in this case, as follows:

> "We agree with the contention that much of the proof, even that offered by the government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as puffing or extolling the merits of their business and product." (R. 450.)

We respectfully request that a rehearing on the petition for certiorari be granted and that on such rehearing the writ of certiorari be issued as prayed in the petition.

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